

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 12-203
Competition in the Market for the)	
Delivery of Video Programming)	

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

In asking what “underlying regulatory, technological, and market conditions . . . influence the total number of *firms* that can compete successfully in the market,” the Commission appears to be ignoring the key role that community-owned multichannel video programming distributors (“MVPDs”) play in providing competitive services in their communities. As a result, NATOA offers the following reply comments from the standpoint of community-owned MVPDs – of which there are now approximately 135.¹ We begin with a brief overview of the important contributions that public communications service providers are

¹ See Institute for Local Self Reliance, Community Broadband Map, <http://www.muninet-works.org/communitymap>; Nate Anderson, “133 US cities now have their own broadband networks,” *Ars Technica* (March 23, 2011), <http://arstechnica.com/tech-policy/2011/03/133-us-cities-now-run-their-own-broadband-networks/>; see also Broadband Communities Magazine Database, <http://www.bbpmag.com/search.php>.

making to their communities and then identify various state and federal barriers to deployment and what the Commission can do to eliminate or mitigate them.

I. Community-owned MVDP's Are Providing Multiple Benefits to Their Communities

As the Commission has previously recognized, publicly-owned MVPDs are benefitting their communities in multiple ways. Not only do they provide competition to incumbent MVPDs in the market for video programming services, resulting in lower prices and higher quality service, but they have often been the first to introduce advanced telecommunications services and capabilities to their communities.

For example, community-owned MVPDs, such as those in Chattanooga, TN, Lafayette, LA, and Wilson, NC, are offering broadband services at gigabit speeds throughout their communities, and dozens of other community-owned fiber networks are capable of doing so, too. These networks are not only providing competitive video program services, but are also serving as drivers of, and platforms for, robust economic development and job creation, advanced educational opportunities of all kinds, work skills development, access to affordable modern health care, state-of-the-art public safety, energy efficiency and security, environmental protection, urban revitalization, improved government services, and much more.²

² For numerous studies, case histories, articles, and other information about the contributions that publicly-owned broadband networks are making to the well-being of the residents, businesses, and institutions in their communities, see the Community Broadband and Economic Development pages of the Baller Herbst website, <http://www.baller.com>; FTTH Council, "Municipal Fiber to the Home Deployments: Next Generation Broadband as a Municipal Utility" (October 2009), <http://bit.ly/PcNPKW>; Broadband Communities Magazine's Municipal Broadband Portal, <http://bit.ly/Rjd6SV>; Community Broadband Networks, <http://bit.ly/RjdiBL>; and the Craig Settles website, <http://bit.ly/Rjcwol>.

As Chairman Genachowski stated on May 23, 2012, in applauding Gig.U's announcement of Gigabit Squared's Gigabit Neighborhood Gateway Program:

To drive U.S. global competitiveness, it's vital that we have super-fast broadband test beds for innovation. It's an important element of unleashing breakthrough innovations in health care, education, business services, and more. ... As outlined in the National Broadband Plan, it's vital both that we connect every corner of America to broadband and that we spur next-generation innovation through next-generation broadband networks.³

Where unimpaired by barriers of the kind discussed below, local governments are playing a much-needed role in bringing next-generation networks to communities across America.

Chairman Genachowski specifically recognized this in his remarks at the Vox Media Center on September 25, 2012:

We need to promote investment in broadband networks. That includes continuing to remove barriers to broadband buildout and lower the costs of infrastructure deployment.

...

We need more state and local initiatives to increase broadband speeds, capacity, and ubiquity, like the one announced today by Chicago Mayor Rahm Emanuel to cover the city's public spaces with Wi-Fi and ensure ultra-high-speed Internet for businesses.

...

If we keep the pedal to the floor, including through smart government policies, we can ensure that our innovators and the American public have the infrastructure they need to preserve and extend U.S. leadership in the global broadband economy.⁴

³ Statement from FCC Chairman Julius Genachowski, May 23, 2012, <http://fcc.us/Rjf71q>.

⁴ Remarks of FCC Chairman Julius Genachowski, "Winning the Global Bandwidth Race: Opportunities and Challenges for the U.S. Broadband Economy," September 25, 2012, <http://bit.ly/VsICTM>

II. State Barriers to Community Broadband Initiatives

Despite the great potential benefits that community broadband networks can provide, at least 20 states have enacted laws that restrict public communications initiatives in some way. These laws are listed and summarized on the Community Broadband page of the Baller Herbst website, <http://bit.ly/VsNR5P>. While these laws operate in many different ways, they have the common purpose and effect of thwarting, delaying, or driving up the costs of public communications initiatives.

In the National Broadband Plan, the Commission weighed the pros and cons of community broadband networks and came down on the side of supporting them:

Municipal broadband has risks. Municipally financed service may discourage investment by private companies. Before embarking on any type of broadband buildout, whether wired or wireless, towns and cities should try to attract private sector broadband investment. But in the absence of that investment, they should have the right to move forward and build networks that serve their constituents as they deem appropriate.⁵

The Commission went on to recommend that “Congress should make clear that Tribal, state, regional and local governments can build broadband networks.”⁶

NATOA strongly supports the Commission’s findings and recommendation, particularly its determination that local officials should ultimately have the right to determine what will work best for their constituents. In a growing number of communities today, local officials are carefully analyzing a range of models to determine which ones will work best in their particular circumstances. These include encouraging incumbents to upgrade their networks; entering into public-private or public-public partnerships of various kinds; developing multi-participant

⁵ FCC, *The National Broadband Plan: Connecting America*, at 153 (March 2010), <http://1.usa.gov/Te7oWV>.

⁶ *Id.*, Recommendation 8.19.

regional networks; establishing non-profits or cooperatives; and many more alternatives. Given the wide differences in local needs and conditions, the Commission is right on the mark in recognizing that local officials are best suited to determine what is most appropriate for their constituents.

NATOA does, however, differ with the Commission in one important respect – NATOA believes that the Commission can and should do more than merely recommend that Congress solve the problem of state barriers. If the Commission finds that state barriers are preventing the deployment of broadband to all Americans as rapidly as possible, the Commission should, consistent with its statutory authority, remove those barriers immediately.

NATOA believes that the Commission has authority to preempt state barriers to community broadband initiatives, either on its own motion or in response to preemption petitions that adversely affected parties may file in the future. To be sure, the Supreme Court found in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), that Section 253(a) of the Communications Act does not preempt state laws that may prohibit or have the effect of prohibiting municipalities from providing telecommunications services.⁷ The Court provided several reasons for reaching this conclusion, including that Congress had not made sufficiently clear in Section 253(a) that it intended the term “any entity” to apply to public entities. NATOA submits that *Nixon* is distinguishable.

For one thing, Section 253(a) and *Nixon* apply only to “telecommunications service.” As the Commission has repeatedly found, both before and after the *Nixon* decision,

⁷ Section 253(a) provides that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

“telecommunications service”⁸ and “information service”⁹ are completely separate and distinct services, and broadband Internet access service falls into the latter category.¹⁰ This distinction is not just a narrow technical one; it has significant substantive implications.

As the Supreme Court recognized in *Nixon*, the Missouri municipalities had “at the least a respectable position, that fencing governmental entities out of the telecommunications business flouts the public interest.” *Nixon*, 541 U.S. at 131. The Court went on to identify that interest as “bring[ing] the benefits of competition [in the market for telecommunications services] to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential.” *Id.* That interest, however worthy, pales in comparison to the national interest in bringing affordable broadband to all Americans as rapidly as possible. As the Commission succinctly put it in the National Broadband Plan,

Broadband is the great infrastructure challenge of the early 21st century. Like electricity a century ago, broadband is a foundation for economic growth, job

⁸ “Telecommunications service” is “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

⁹ “Information service” is defined in the Communications Act as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

¹⁰ See, e.g., *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798; [17 FCC Rcd 4798, 2002 WL 407567](#) (rel March 15, 2002), *aff’d Nat’l Cable & Telecom. Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities...*, 20 FCC Rcd 14853 (2005); *aff’d, Time Warner Cable v. FCC*, 507 F.3d 205 (3d Cir. 2007); *In the Matter of United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, Memorandum Opinion and Order*, [21 FCC Rcd 13281, 2006 WL 3207080 \(2006\)](#), ¶ 2 (rel. Nov. 7, 2006); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd. 5901, 2007 WL 1288052 (F.C.C.).

creation, global competitiveness and a better way of life. It is enabling entire new industries and unlocking vast new possibilities for existing ones. It is changing how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge.¹¹

Congress, too, has not only recognized the tremendous importance of access to the Internet for all Americans, but it has also made clear that state regulation that interferes with such access is contrary the policy of the United States.

(b) Policy. -- It is the policy of the United States--

...

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*;

...

Communications Decency Act § 230(b)(2) (emphasis added).

In sum, *Nixon* is inapplicable to community broadband and therefore does not constrain the Commission's ability to preempt state barriers to community broadband. Furthermore, the *Nixon* decision has been widely criticized on the merits.¹² At the very least, the case deserves a fresh examination, against the backdrop of America's compelling interest in fostering the rapid deployment, adoption, and use of affordable broadband to all Americans.

Many of the state barriers in question certainly fetter the development of vibrant and competitive markets for broadband Internet access services, and in some cases, they prevent some communities from obtaining *any* broadband Internet access service.¹³ If the Commission

¹¹ *National Broadband Plan: Connecting America*, Executive Summary, at xi.

¹² Olivier Sylvain, "Broadband Localism," 73 Ohio State L. J. 2013 (February 2012); Laurie Reynolds, "A Role For Local Governments in Federal-State Disputes," 43 Urban Lawyer 977 (Fall 2011); Matthew Dunne, "Let My People Go (Online): The Power of the FCC to Preempt State Laws That Prohibit Municipal Broadband," 107 Colum. L. Rev. 1126 (June 2007).

¹³ For example, North Carolina (NC Code § 160A-340(4)) and South Carolina (SC Code § 58-9-2610(D)) tie their definitions of "broadband" for the purposes of their barriers to community

finds that state barriers are preventing the deployment of broadband to all Americans as rapidly as possible – as it should – it has the duty to remove those barriers immediately by using whatever authority it has available.

In addition to preempting offending state barriers to public broadband initiatives, there are a number a number of additional helpful steps that the Commission can take. For example, it can intervene on the side of communities in opposing any new state barriers to community broadband or in supporting citizen-led efforts to repeal existing barriers. It can follow up on its Recommendation 8:19 to Congress by becoming more active in seeking federal preemptive legislation. At the very least, it can prepare a report that supporters of community broadband can use with state legislatures and Congress to underscore the valuable benefits these networks provide to their residents and businesses. NATOA encourages the Commission to take all of these steps.

III. Federal Barriers to Community Broadband

The Commission seeks comment on the impact of various FCC rules and regulations on the ability of MVPDs to enter the field and compete with other MVPDs. Among these are regulations governing program access, program carriage, must carry, retransmission consent, effective competition, access to multiple dwelling units, exclusivity, and inside wiring. The Commission has conducted, or is conducting, rulemakings in each of these areas.

broadband initiatives to the Commission’s obsolete use of the term “basic broadband” for reporting purposes – i.e. 768 kbps download/200 kbps upload. They do this even though the Commission has repeatedly stated since 2010 that download speeds of at least 4 Mbps and upload speeds of at least 1 Mbps are necessary to have a meaningful Internet experience. *See, e.g., FCC, Eighth Broadband Progress Report*, GN Dkt. 110-121, 2012 FCC LEXIS 3573, ¶ 20 (rel. Aug. 21, 2012).

Unfortunately, a recurring and overarching problem with the Commission's approach to rulemaking is that there is little follow-up to determine the actual effect that the Commission's rules and regulations have on increasing competition in the marketplace. Sometimes the Commission's one-size-fits-all rules and regulations work well for major players, but do not work for small MVPDs. The Commission's rules on access to multiple dwelling units and inside wiring provide a good example.

Under the Commission's rules, MVPDs are prohibited from entering into or enforcing exclusive video service agreements, but they are free to enter into anti-competitive agreements of any other kind, including exclusive easements, exclusive rights to use of inside wiring, exclusive rights to market, exclusive rights to charge units for services whether or not they receive them, exclusive right to remain on the premises after a video sales agreement ends, and so on. With this gauntlet of exclusivities, incumbents can effectively limit the ability of new entrants to provide service all areas of a city.

The Commission should revisit these and other rules to determine whether there are other options that would have struck a better balance between incumbents and new entrants than the ones the Commission ultimately chose. If so, the Commission should make the appropriate adjustments.

IV. CONCLUSION

In summary, a substantial number of communities have developed advanced communications networks that can benefit residents, businesses, and institutions in multiple ways. Under the right conditions, many other communities may also be willing to do so – either in partnership with the private sector, or on their own if necessary. The Commission has often expressed support for community networks, but the times require more aggressive action from

the Commission. NATOA encourages the Commission to give such network a fair chance of surviving and thriving.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. Traylor".

Stephen Traylor
Executive Director/General Counsel
NATOA
3213 Duke Street, #695
Alexandria, VA 22314
703-519-8035

October 10, 2012